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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE TOLEDO TRUST COMPANY, AS TRUSTEE OF
TRUST NO. 4118 AND THE TOLEDO TRUST COMPANY,
AS TRUSTEE OF TRUST NO. 4117,
Petitioners,
vs.
SANTA BARBARA FOUNDATION,
Respondent.

On Petition For Writ Of Certiorari
To the Ohio Supreme Court

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF
OF THE OHIO BANKERS ASSOCIATION TRUST
DIVISION AS *AMICUS CURIAE* IN SUPPORT OF
PETITION

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**MOTION FOR LEAVE TO FILE BRIEF OF THE OHIO
BANKERS ASSOCIATION TRUST DIVISION AS AMICUS
CURIAE IN SUPPORT OF PETITION**

The Ohio Bankers Association Trust Division, as *Amicus Curiae*, hereby respectfully moves for leave to file the attached Brief in Support of Petition For Writ of Certiorari.¹

The Ohio Bankers Association Trust Division is a statewide association representing the interests of both state and national banks. As a statewide trade association, it is the spokesman for nearly every corporate, commercial trustee in the State of Ohio, and its perspective is broader and quite different from that of the parties. Accordingly, the arguments that this *Amicus Curiae* advances will be markedly different than those advanced by the parties. Unquestionably, the decision of the Ohio Supreme Court will have a detrimental impact on each and every trustee in Ohio, whether the trustee is an individual or a corporate, commercial fiduciary. If the decision below is allowed to stand, all trustees will be forced to meet an unparalleled burden requiring the appearance and the defense of their respective trust's interests in any State, regardless of where the trustee is located and administering the trust assets, regardless of where the trust assets are located, without service of summons and complaint upon the trustee, and without the existence of even a colorable claim of jurisdiction over the trustee or the trust assets. Each and every

¹ The consent of the Petitioners has been obtained. The consent of the Respondent was requested but refused. (See attached Appendix A1-A7.) *Amicus Curiae's* requests for consent, Petitioners' consents and Respondent's refusal have been filed with the Clerk of this Court.

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individual and corporate fiduciary has a very real and important interest in this case, an interest that can best be presented only by the Ohio Bankers Association Trust Division.

Respectfully submitted,

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III

QUESTIONS PRESENTED

1. WHETHER PETITIONERS, WHO ARE, RESPECTIVELY, AN OHIO BENEFICIARY CLAIMANT OF TRUST PROPERTY, AND THE OHIO TRUSTEE HOLDING AND ADMINISTERING SUCH PROPERTY, WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT BASED UPON THE OHIO SUPREME COURT'S FINDING THAT THE CALIFORNIA COURT WAS A "PROPER FORUM."
2. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE THERE ARE NO CONTACTS BETWEEN PETITIONERS AND CALIFORNIA.
3. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE THE TRUST ASSETS WERE LOCATED IN OHIO, NOT CALIFORNIA.

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4. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE PETITIONERS WERE PROVIDED ONLY WITH NOTICE INDICATING THAT THE CALIFORNIA PROCEEDING WAS CONFINED TO A DETERMINATION OF ENTITLEMENT TO SHARE IN AN ESTATE OF WHICH THE TRUST ASSETS WERE NOT A PART.
5. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT DIRECTING THE DISTRIBUTION OF TRUST ASSETS HELD BY AND BELONGING TO PETITIONERS, WHERE THE PETITIONERS WERE NOT MADE PARTIES OR SERVED WITH SUMMONS AND COMPLAINT IN THE CALIFORNIA PROCEEDING.
6. WHETHER PETITIONERS WERE DENIED DUE PROCESS OF LAW AND WERE FURTHER DENIED THE PROTECTION AFFORDED UNDER THE CONTRACT CLAUSE, BY A JUDGMENT OF THE OHIO SUPREME COURT GIVING PRECLUSIVE EFFECT, AS A MATTER OF FULL FAITH AND CREDIT, TO AN ORDER OF A CALIFORNIA COURT,

WHERE THE CALIFORNIA JUDGMENT DEROGATED THE TERMS OF AN IRREVOCABLE OHIO TRUST.

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AS TRUSTEE OF TRUST NO. 4117,
Petitioners,

vs.

SANTA BARBARA FOUNDATION,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION

The Ohio Bankers Association Trust Division, as *Amicus Curiae*, respectfully requests that a Writ of Certiorari issue to review the judgment and decision of the Ohio Supreme Court entered on August 26, 1987.

OPINIONS BELOW

The opinions of the lower courts are reported as set forth by Petitioners in their Petition. Petitioners' statement, therefore, is adopted and incorporated herein by this *Amicus Curiae*.

JURISDICTION

The jurisdiction of this Court is as set forth by Petitioners in their Petition, and such is adopted and incorporated herein by this *Amicus Curiae*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those constitutional provisions and statutes set forth by Petitioners in their Petition, this case involves the following constitutional provision and statute:

1. U.S. Constitution, Article I, Section 10, Clause 1, provides:

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. California Civil Code Section 1390.2 (Deering) appears in the Appendix at A8 as filed by *Amicus Curiae*.

HOW FEDERAL QUESTIONS WERE RAISED AND PASSED UPON BELOW

The statements of the Petitioners are adopted and incorporated herein by this *Amicus Curiae*.

STATEMENT OF THE CASE²

In 1960, The Toledo Trust Company entered into a contract with Nancy S. Jones pursuant to which there was created an irrevocable trust for Nancy S. Jones' daughter, Marcia Rivas, as income beneficiary. This contract, known as Trust No. 4117, expressly provided that,

This agreement and all of the trust assets held in trust hereunder shall be subject to and held,

² This statement is supplemental to the statement of the case contained in the Petition For Writ of Certiorari filed by Petitioners and is not intended to be a complete restatement of the case.

administered and distributed in accordance with the laws of the State of Ohio. A65.³

Trust No. 4117 also provided that upon Marcia Rivas' death, the principal was to be distributed as Marcia Rivas "may by her Last Will and Testament appoint," and, to the extent that she failed effectively to exercise the power of appointment, the trust assets would be added to and become a part of Trust No. 4118, which Nancy S. Jones had established, also by contract with The Toledo Trust Company, for another daughter. A50.

At all times The Toledo Trust Company has held and administered the trust assets in the State of Ohio in accordance with Ohio law. A44. The trust assets never attained a *situs* outside of Ohio. Nor does the record reveal that The Toledo Trust Company ever performed any act or engaged in any conduct of any nature in the State of California.

Marcia Rivas died a resident of California and her Will was accordingly admitted to probate in the Superior Court of California, County of Santa Barbara, under Case No. SM 38985 in probate proceedings captioned "In the Matter of the Estate of Marcia MacDonald Rivas, aka Marcia MacDonald, Deceased." A44. In her Will, Marcia Rivas attempted to exercise the special power of appointment of the assets held by The Toledo Trust Company in Trust No. 4117. A70. Although the attempt to exercise the special power was made by Marcia Rivas in her Last Will, under well established California law, this fact did not transform the trust assets into probate assets regardless of whether the attempt to exercise the power was effective or ineffective.⁴

³ Unless otherwise noted, all references to the Appendix are to the Appendix filed by Petitioners.

⁴ Rather, if the power was effectively exercised, the trust assets would pass outside of the probate estate by direct transfer from the

On September 16, 1983, Santa Barbara Foundation filed in the Rivas' Estate a "Petition For Determination of Entitlement To Distribution of Estate." The Petition represented that Alcoholics Anonymous, an appointee of a portion of the trust assets pursuant to the decedent's attempted testamentary exercise of the special power, did not "... qualify under Probate Code Section 27 as a person or organization capable of taking a testamentary disposition by Will," that Alcoholics Anonymous was unable to accept the assets appointed to it under the Will of decedent, and that in order to carry out "the intent" of Marcia Rivas and "fulfill" the purpose of the trust and power of appointment exercised under her Will to Alcoholics Anonymous, said gift should be made payable to the Santa Barbara Foundation. A76-A79.

Although Santa Barbara Foundation additionally recited in its Petition that "... various persons and organizations claimed an interest in the estate of decedent and the property in trust ...," (A78-A79) none of these interested persons and organizations, including The Toledo Trust Company, were made a party to this proceeding. The Toledo Trust Company was never served with any summons and complaint, or any other process by which the California court might have purported to obtain personal jurisdiction over it. Rather, The Toledo Trust Company only received a notice, dated September 16, 1983, that a hearing was scheduled for October 6, 1983. This notice, issued pursuant to California Probate Code Section 1200.5 pro-

grantor of the power (i.e., Nancy S. Jones) to the appointee. *Estate of Baird*, 120 Cal. App.2d 219, 227-229 (1953); *Estate of Masson*, 142 Cal. App.2d 510 (1956); also see *Estate of Rosecrans*, 4 Cal.3d 34 (1971), footnote 4 at page 38. On the other hand, if the power was ineffectively exercised, the trust assets would pass pursuant to the terms of Trust No. 4117 to Trust No. 4118. *Estate of Baird, supra*, at 227. Furthermore, under California statutory law, the trust assets that were the subject of the special power were not subject to the claims of creditors of Marcia Rivas' estate or to the expenses of estate administration. California Civil Code Section 1390.2 (Deering).

viding for notice to parties "interested" in probate proceedings, advised The Toledo Trust Company that it could attend if it wished, but was not required to do so. A86-A87.

After Santa Barbara Foundation filed its Petition and notice of hearing was sent to those interested parties, Alcoholics Anonymous filed a document captioned "Declaration of Declination of Bequest and Appointive Assets," wherein Alcoholics Anonymous stated that it was declining to accept the bequest and appointment of ten (10%) percent of the trust assets (of Trust No. 4117) except the amount of \$500.00. A74-A75.

At the October 6, 1983 hearing only Santa Barbara Foundation appeared. Consequently, the record reflects no hearing whatsoever, but only an Order dated and filed with the court on October 13, 1983. This Order specifically directed that,

10% of the assets of [the] Trust . . . is hereby ordered distributed to Santa Barbara Foundation, to be held and administered as a charitable Trust. . . .⁵ A97-A98.

Although this Order was entered in a proceeding initiated by the filing of a "Petition For Determination of Entitlement To Estate Assets," it most notably does not provide for any distribution of estate assets, any distribution of assets to the estate executor for administration as estate assets, or any distribution of assets to beneficiaries of the probate estate. Instead, the Order directs distribution of trust assets to Santa Barbara Foundation, as successor trustee to The Toledo Trust Company, and establishes entirely new and different terms and conditions

⁵ The amount of ten (10%) percent of the assets is the exact total amount which Marcia Rivas had previously attempted to appoint to Alcoholics Anonymous with no adjustment for the \$500.00 that Alcoholics Anonymous was willing to accept.

for the administration of such trust assets. Of critical importance is the absence of any findings with respect to the court's own jurisdiction—either jurisdiction over the trust assets or over The Toledo Trust Company as trustee. Equally critical is the absence of any specific finding with respect to the decedent's testamentary intent.

The Toledo Trust Company, as trustee of Trust No. 4117, then filed suit in the Common Pleas Court of Lucas County, Ohio, to seek a determination of its rights and obligations given the then conflicting claims of Santa Barbara Foundation, arising by virtue of the California order, and of Trust No. 4118, as the taker-in-default designated in Trust No. 4117. A35-A37. The proceedings in the trial court, the court of appeals and the Ohio Supreme Court are as set forth by the Petitioners. Clearly, the proceedings in Ohio concluded in the Ohio Supreme Court with that court's holding that the California Order was entitled to full faith and credit in Ohio and was binding on The Toledo Trust Company, notwithstanding a vigorous dissent written by Justice Locher, who was of the firm opinion that,

The California superior court in this case had no jurisdiction over either The Toledo Trust Company, the trustee, or the trust assets. The mere fact that notice of the hearing in the California superior court was mailed to Toledo Trust does not subject Toledo Trust to the jurisdiction of that court. A11-A12.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Ohio Supreme Court judgment not only ignores but also attempts to abrogate every United States Supreme Court decision within the past thirty (30) years that collectively establish and define not only the standards governing the application of the full faith and credit doctrine but also the standards of due process—standards that are

constitutional limitations upon a State court's invocation of jurisdiction. If this judgment remains intact, a State court's jurisdiction may be predicated upon no more than 1) the mailing of a notice, rather than the service of summons and complaint, 2) to an interested party, rather than a named defendant, 3) who has no contact with the forum State, rather than minimum contacts.

In the context of trust administration, an additional result will be the impairment of established contract rights of trustees and trust grantors specifying who shall serve as trustee and under what State's law trust assets are to be held, administered and distributed. Henceforth, trustees will face an unparalleled and unconstitutional burden to appear at every hearing in any State regardless of where the trustee resides, does business or administers the assets. This burden cannot be met by trustees, whether a commercial bank or an individual. Simply stated, the Ohio Supreme Court decision is of dangerous precedence to trust administration, and, indeed, to the federalist underpinning of our judicial system.

II. THE OHIO SUPREME COURT MISAPPLIED THE FULL FAITH AND CREDIT DOCTRINE, THEREBY DENYING DUE PROCESS OF LAW TO THE TOLEDO TRUST COMPANY, BECAUSE THE CALIFORNIA COURT LACKED JURISDICTION.

A. Full Faith and Credit Cannot Be Given To The California Judgment Based Upon Only The Ohio Supreme Court's Finding That California Was A "Proper Forum."

The decision of the Ohio Supreme Court omits any recitation or consideration of the profoundly relevant and fundamental principles governing the application of the full faith and credit doctrine. Beyond this, the Ohio Supreme Court creates a new rule: once it is determined that the California court was a "proper forum" to address the subject matter of the testamentary intent of a California dom-

iciliary, then with no further inquiry made, the California judgment is entitled to full faith and credit.

The decision of the California superior court merely sought to ascertain and give effect to the testamentary intent of a California domiciliary. As mentioned above, it was a proper forum to make this determination. Once rendered, the judgment was entitled to full faith and credit in any subsequent Ohio proceeding governing the disposition of the trust assets. A9.

A Writ of Certiorari should issue if only to address the Ohio Supreme Court's erroneous holding which in effect is a pronouncement of a new "proper forum" test as the sole basis for determining when full faith and credit should be given to a foreign State court's judgment.⁶

Issuance of the Writ would serve to reaffirm this Court's previously announced principles defining the full faith and credit doctrine. First, the full faith and credit provisions of the United States Constitution (Article IV, § 1) and its statutory codification (28 U.S.C. § 1738) require that the courts of one State treat as conclusive the judgments of a forum State's courts "... only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment," *Durfee v. Duke*, 375 U.S. 106, 110 (1963). Second, full faith and credit may only be afforded those judgments rendered with jurisdiction over the subject matter and the parties to be bound. *Underwriters National Assurance Co. v. North Carolina Life Guarantee Ass'n.*, 455 U.S. 691 (1982); *Nevada v. Hall*, 440 U.S. 410 (1979). Third, a forum State's judgment may not be afforded preclusive effect against entities that

⁶ If this Court is not disposed to grant certiorari for any of the reasons advanced, this *Amicus Curiae* respectfully suggests that the Ohio Supreme Court's misuse of the full faith and credit doctrine renders this an appropriate case for the Court to reverse summarily.

were not parties (or their privies) to the forum court's proceeding, *Durfee v. Duke*, *supra*, or whose interests were not fully represented by such parties. *Underwriters National Assurance Co. v. North Carolina Life Guarantee Ass'n.*, *supra*. Fourth,

... a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. *Durfee v. Duke*, 375 U. S., at 111.

In the instant matter, the Ohio court erred by applying the full faith and credit doctrine so as to make the California judgment binding on trustees over which the California court had no jurisdiction, which were not parties or privies to the California proceeding, whose interests were not represented in any manner in that proceeding, and where the Ohio court made no inquiry as to what had been fully and fairly litigated and finally decided in California. Had inquiry been made, it would have disclosed that no questions, including jurisdictional issues, had been fully and fairly litigated in California. Such inquiry would have disclosed additionally that the California court did not decide what Marcia Rivas' testamentary intent was, but rather directed the disposition of trust assets located in Ohio and held by an Ohio trustee.

B. The California Court Lacked Jurisdiction Over The Toledo Trust Company Due To The Absence Of "Minimum Contacts."

The erroneous nature of the Ohio decision is best highlighted by reference to the substantially similar case of *Hanson v. Denckla*, 357 U.S. 235 (1958). In *Hanson*, this Court considered a Delaware judgment which refused to afford full faith and credit to a Florida judgment holding that a trust agreement and power of appointment were

ineffective, so that trust assets passed under the residuary clause of a decedent's Will and not pursuant to the decedent's exercise of the power of appointment granted by the trust agreement. This Court held, in part, that the Delaware judgment correctly denied preclusive effect to the Florida judgment, because the Florida court lacked *in personam* jurisdiction over the trustee.

The *Hanson* court recognized that, under Florida law, the non-resident trustee was an indispensable party to the litigation.⁷ The proponents of the Florida judgment argued that it was binding upon the non-resident trustee by virtue of notice which had been published in Florida, and by virtue of mailing to the trustee a copy of pleadings and a "Notice To Appear and Defend". However, this Court stated that jurisdiction could only be asserted over the trustee, consistent with due process requirements, if the trustee had sufficient "minimum contacts" with Florida, pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). For the Delaware trustee to be bound by the Florida judgment, there had to be some act(s) by which the trustee had "... purposefully avail[ed] itself of the privilege of conducting activities within the forum State,

⁷ Not surprisingly, California law likewise would appear to render the trustee an indispensable or necessary party to proceedings which, as herein, dispose of trust assets. Under California law, an express trust is not an entity separate from the trustee, who is the real party in interest in litigation concerning the trust, *Powers v. Ashton*, 45 Cal. App.3d 783, 119 Cal. Rptr. 729 (1975), and a necessary party to litigation involving the relations of trustee and beneficiaries, *De Olazabal v. Mix*, 24 Cal. App.2d 258, 74 P.2d 787 (1937). In general, persons whose interests or duties will inevitably be affected by an adjudication are indispensable parties, without whom the court lacks jurisdiction to proceed. Cal. Civ. Proc. Code Section 389 (Deering); *Fraser-Yamor Agency, Inc. v. Del Norte County*, 68 Cal. App.3d 201, 137 Cal. Rptr. 118 (1977). Respondent herein can hardly be heard to argue that the California judgment, which requires distribution of Ohio trust assets, does not inevitably affect the interests or duties of the Ohio trustee.

thus invoking the benefits and protections of its laws." 357 U.S., at 253.

This Court concluded that the Delaware trustee lacked such minimum contacts, and therefore was not subject to the jurisdiction of the Florida court. Thus, the Delaware trustee could not be bound by the Florida court's judgment in the subsequent Delaware action. The factors upon which this Court's conclusion rested apply with equal force to The Toledo Trust Company, so far as the record herein discloses:

The . . . trust company has no office in [California], and transacts no business there. None of the trust assets has ever been held or administered in [California], and the record discloses no solicitation of business in that State either in person or by mail. 357 U.S., at 251.

Following *Hanson*, this Court on numerous occasions again has addressed the issue of when a State court may assert *in personam* jurisdiction over a non-resident defendant such that "traditional notions of fair play and substantial justice" are not offended. While this *Amicus* would assert that every decision on the subject of *in personam* jurisdiction and minimum contacts which this Court has ever issued now compels this Court to find, as did the Ohio Supreme Court's dissenter, that The Toledo Trust Company could not and should not be bound by the California judgment, another decision of this Court is particularly illustrative. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this Court held that an Oklahoma court could not exercise *in personam* jurisdiction over New York corporations where they did no business in Oklahoma and where there was a total absence in the record of any affiliating circumstances between the defendants and the forum state. See also, *Kulko v. California Superior Court*, 436 U. S. 84 (1978).

This *Amicus* simply asks: if an attempt to exercise *in personam* jurisdiction over the Delaware trustee in *Hanson* and over the "distant" defendants in *World-Wide Volkswagen* violate due process, how can binding The Toledo Trust Company to the California judgment not be equally violative? The Ohio judgment permits The Toledo Trust Company, which has no contacts with California, to be "haled into court" in California solely as a result of the unilateral activity of another. Such a result violates The Toledo Trust Company's due process rights. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

C. The Toledo Trust Company Was Administering Trust Assets That Were Located Within Ohio, Not California, And, Thus, Were Beyond The Jurisdiction of The California Court.

Because jurisdiction was never an issue litigated in California's proceedings and, correspondingly, there is no specific finding by the California court as to the basis of its jurisdiction, Respondent may argue alternatively that jurisdiction is not *in personam* but rather is *in rem* or *quasi in rem*. However, such a distinction, if made, does not result in any different constitutional analysis, and, moreover, is no longer an appropriate distinction.

Certainly the *Hanson* decision drew a distinction between jurisdiction *in rem* over trust assets and jurisdiction *in personam* over the trustee. The *Hanson* court found *in rem* jurisdiction lacking because, as is the case herein, the trust assets were situated and administered outside the forum State. The Ohio Supreme Court judgment is similarly flawed in that it permits the California judgment to operate expressly and directly on assets located beyond the jurisdiction of the California court. This Court has long and repeatedly recognized the inability of a forum State's judgment to operate dispositively on assets outside the forum State. *Western Union Telegraph Co. v. Pennsylva-*

nia, 368 U. S. 71 (1961); *Riley v. New York Trust Co.*, 315 U. S. 343 (1942); *Baker v. Baker, Eccles & Company*, 242 U. S. 394 (1917); *Fall v. Eastin*, 215 U. S. 1 (1909).

No longer, however, is the distinction between jurisdiction *in rem* and jurisdiction *in personam* one of any substantive meaning, at least with respect to constitutional due process standards. Subsequent to *Hanson*, this Court determined that all assertions of jurisdiction should be judged against the *International Shoe* minimum contacts standard, whether such jurisdiction is characterized as being *in personam*, *in rem*, or *quasi in rem*. *Shaffer v. Heitner*, 433 U. S. 186 (1977).

Furthermore, it should be recognized that although the California judgment arose in a probate context, which some may view as an *in rem* proceeding, and ostensibly was brought to construe a domiciliary's attempted exercise of a testamentary power of appointment, those facts do not validate the California judgment or Ohio's subsequent grant of full faith and credit. First, it must be recalled that the California judgment did not simply construe a domiciliary's attempt to exercise a power of appointment; rather, the California court expressly ordered the distribution of trust assets held and administered in Ohio, in a manner contrary to that provided by the Ohio trust agreement. That the California proceeding was incident to an estate administration does not entitle that court's judgment to preclusive effect with respect to parties or assets over which the court lacked jurisdiction. In *Riley v. New York Trust Co.*, *supra*, this Court held that the Full Faith and Credit Clause did not require that a State, in disposing of local assets, give preclusive effect to a sister State's adjudication of domicile for probate purposes, stating:

While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judg-

ment extra-territorial effect upon assets in other states. 315 U. S., at 353.

In short, the general rule that a forum State's judgment cannot operate to bind parties or dispose of assets over which the forum court lacks jurisdiction applies equally to judgments rendered in probate proceedings. *Baker v. Baker, Eccles & Company, supra*. Accord, *Overby v. Gordon*, 177 U. S. 214 (1900). See also, *Hanson v. Denckla, supra*.

Notwithstanding the Ohio court's finding that California was the "proper forum," neither California's interests in the administration of its domiciliaries' estates nor any purported convenience of that forum to litigate issues that may touch such administration permit that State's judgments to enjoy extra-territorial effect. The strength of a State's interests or the convenience of that forum are not dispositive in determining the extent of the forum court's jurisdiction. *World-Wide Volkswagen Corp. v. Woodson, supra*. While such considerations may be important for choice of law purposes, they cannot serve as a basis for jurisdiction. *Helicopteros Nacionales de Colombia v. Hall, supra*; *Kulko v. California Superior Court, supra*. Moreover, although a non-resident's submission to the jurisdiction of a forum court would undoubtedly simplify the proceedings,

... the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' That cost is too high. *Shaffer v. Heitner*, 433 U.S., at 211.

In the instant case, the California court ordered the transfer to California of trust assets held and administered in Ohio pursuant to a trust agreement entered into in Ohio and governed by Ohio law. The Ohio court then denied due process to the Ohio trustee and the taker-in-default by affording the California judgment extra-territorial and

preclusive effect with respect to trust assets located beyond the forum court's jurisdiction.

D. The Notice Sent To The Toledo Trust Company Was Insufficient In That It Was Not Fully Descriptive.

In an attempt to bind The Toledo Trust Company and give preclusive extra-territorial effect to a judgment ordering distribution of Ohio trust assets, the California court mailed to The Toledo Trust Company a "Notice of Hearing (Probate)," which indicated simply that Santa Barbara Foundation had filed a "Petition For Determination of Entitlement To Distribution of Estate" of Marcia Rivas, and that a hearing on the matter would be held October 6, 1983, at which time The Toledo Trust Company could appear if it chose to do so. A68-A69. Promptly thereafter, on October 13, 1983, the California court entered judgment ordering distribution of the Ohio trust assets.

The Notice issued by the California court did not adequately advise The Toledo Trust Company (either as trustee or as the taker-in-default) that its own interests or the interests of trust beneficiaries might be affected, or that trust assets might somehow be distributed. Indeed, the Notice was plainly misleading; it described the nature of the hearing as "Probate," and referenced Respondent's Petition, brought ostensibly to determine entitlement to share in a probate estate. However, the Ohio trust assets were *not estate* assets. Under California law, trust assets subject to a power of appointment pass directly from the donor of the power to the appointee or to a taker-in-default; they are not a part of the donee's estate,^a nor subject to the claims of estate creditors or the expenses of estate administration. California Civil Code Section 1390.2 (Deering).

This Court has held that:

^a See footnote 4.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted.] The notice must be of such nature as reasonably to convey the required information *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

To comport with due process, such notice must be "fully descriptive," *i.e.*, "... should describe the action and the [parties'] rights in it." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Characterizing the proceedings as *in rem*, rather than *in personam*, does not relax this notice requirement. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Such notice must still be sufficient to apprise interested persons that their interests may be affected. *Greene v. Lindsey*, 456 U.S. 444 (1982). The notice provided herein, indicating simply that the court would hear a petition to determine entitlement to share in an estate in which the Ohio trustee had no direct or fiduciary interest, and of which the Ohio trust assets were not a part, hardly can be characterized as "fully descriptive" and sufficient to afford due process, when that hearing results in a judgment which distributes those Ohio trust assets to a new California trustee.

E. The Toledo Trust Company Was Not Made A Party To The California Proceedings And Was Not Served with Summons

This Court has held that before a person can be made a party to an action, there must be more than notice and a constitutionally sufficient relationship between the defendant and the forum—there must be service of summons. In *Omni Capital International v. Rudolph Wolff and Co., Ltd.*, ___ U.S. ___, 56 U.S.L.W. 4031 (1987), the Court

addressed the absolute necessity of service of s ummons as it relates to a court's invocation of personal jurisdiction. Speaking in terms of a federal court's exercise of personal jurisdiction, this Court, in a statement equally applicable to state courts, reaffirmed that:

Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. '[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.' *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946). Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant. *Omni Capital International v. Randolph Wolff & Co., Ltd.*, — U.S. — , 56 U.S.L.W., at 4033.

This decision in *Omni Capital International*, *supra*, is consistent with this Court's much earlier decision in *Baker v. Baker, Eccles & Company*, 242 U.S. 394, 403 (1917), wherein it is set forth:

... to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory.

It necessarily follows from these decisions that if there has *not* been service of summons, as in the case *sub judice*, the court does *not* have personal jurisdiction over an entity even if the forum court issued notice of hearing and the entity had sufficient minimum contacts with the forum.⁹

F. Contract Rights of The Toledo Trust Company And Of The Trust's Grantor Were Impaired.

The California judgment improperly derogated contract rights established by the Ohio trust agreement. Trust No. 4117 provided that, upon an ineffective exercise of the testamentary power of appointment, the trust assets should be added to and become a part of Trust No. 4118. A32. Also, the contract creating Trust No. 4117 provided that assets held thereunder should be administered and distributed by The Toledo Trust Company in accordance with Ohio law. A49. Trust No. 4117 being irrevocable, the provisions of Trust No. 4117 could not be changed by the trustee or by the trust grantor. Nonetheless, the California court essentially revoked Trust No. 4117 by ostensibly applying California law, which it construed as permitting the creation of a new, California trust, to which it ordered distribution of trust assets held by Trust No. 4117. By affording full faith and credit to a California judgment which alters contract rights established by a trust agreement that, like the trustees, has no connection to the forum, the Ohio judgment contravenes the Ohio trustees' due process rights. *Kulko v. California Superior Court, supra*.

An analogy can be drawn between the instant trust agreement and the policies of insurance and re-insurance at issue in *Home Insurance Company v. Dick*, 281 U.S. 397 (1930). In that case, a Texas statute was applied to

⁹ Not at issue here in this case are plaintiff and defendant class actions, privies to parties or those whose interests are adequately protected by parties.

vary the terms of insurance contracts subject to the law of Mexico. This Court noted that the insurance contracts and all acts relevant thereto arose in Mexico or New York, and that Texas lacked meaningful contacts with such contracts. The Court held that Texas was without power to alter the contract terms, and its attempt to impose upon the parties a different obligation from that agreed to in those contracts constituted a deprivation of property without due process of law.

Similarly, the California court's judgment impairs contract rights in a manner at least analogous to that prohibited by the Contract Clause. While this Court has held that the Contract Clause applies only to impairments of contract by legislation, *Tidal Oil Company v. Flanagan*, 263 U.S. 444 (1924), it has also recognized that judges, as well as legislators, make law, e.g., *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983). Thus, while the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," First Amendment protections have been extended beyond legislation to apply, for example, to common law libel actions, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the instant action, the California court has violated the Contract Clause's central concern for "promoting confidence in the stability of contractual obligations," *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 15 (1977), by ignoring and derogating specific terms of the Ohio trust agreement. The Ohio court then also violated the Contract Clause by affording full faith and credit to the California judgment. As such, this case may provide an opportunity, should the Court so desire, for re-examination of this Court's decision in *Tidal Oil Company v. Flanagan*, *supra*.

CONCLUSION

For the reasons set forth, the Court should grant the petition.

Respectfully submitted,

NANCY L. SPONSELLER
Counsel of Record

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The Ohio Bankers Association

Trust Division

General Counsel for

Amicus Curiae

The Ohio Bankers Association

Trust Division

APPENDIX

A1

TRUST DIVISION/OHIO BANKERS ASSOCIATION

51 North High Street
Columbus, Ohio 43215
Telephone 614/221-5121

January 8, 1988

Mr. Donald F. Melhorn, Jr.
Marshall & Melhorn
Four SeaGate, 8th Floor
Toledo, Ohio 43604

Dear Mr. Melhorn:

The Ohio Bankers Association Trust Division requests your permission to file an amicus curiae brief in support of the petition for certiorari in the United States Supreme Court, filed by the Toledo Trust Company in the case of *Toledo Trust Co. vs. The Santa Barbara Foundation*. This application is being made to all parties as required by Supreme Court Rule 36.

The Ohio Bankers Association is a statewide trade association representing virtually all of Ohio's commercial banks and their trust departments, which will be adversely impacted by the decision of the Ohio Supreme Court in this case. Thus we can provide the Supreme Court with valuable input from the broader perspective of the industry as a whole. Such information supplementing that of the parties in their respective briefs, may be beneficial to the court in reaching its decision.

In order to properly prepare our filing, we would appreciate your notice of acquiescence or denial as soon as it is convenient.

Sincerely,

/s/Jeffrey D. Quayle
Executive Director Trust and
General Counsel

A2

Law offices of
MARSHALL & MELHORN
Four SeaGate
Eighth Floor
Toledo, Ohio 43604

(419) 249-7100
CABLE: PATLEX TOLEDO
TELECOPIER: (419) 249-7151

January 11, 1988

Mr. Jeffrey D. Quayle
Executive Director Trust and
General Counsel
Trust Division/Ohio Bankers Association
51 North High Street
Columbus, Ohio 43215

Re: The Toledo Trust Company v.
Santa Barbara Foundation

Dear Mr. Quayle:

As Trustee of Trust No. 4117 The Toledo Trust Company consents to the filing by the Ohio Bankers Association Trust Division, as *amicus curiae*, of a brief in support of the petition to the Supreme Court of the United States for a writ of certiorari in this case.

Sincerely yours,

/s/Donald F. Melhorn, Jr.
Donald F. Melborn, Jr.

DFM/nlh

cc: Michael S. Messenger, Esq.
Benjamin B. Segel, Esq.
Jerome J. Robison, Esq.

TRUST DIVISION/OHIO BANKERS ASSOCIATION

51 North High Street
Columbus, Ohio 43215
Telephone 614/221-5121

January 8, 1988

Mr. E. Thomas Maguire
Robison, Curphey & O'Connell
Four SeaGate, 9th Floor
Toledo, Ohio 43604

Dear Mr. Maguire:

The Ohio Bankers Association Trust Division requests your permission to file an amicus curiae brief in support of the petition for certiorari in the United States Supreme Court, filed by the Toledo Trust Company in the case of *Toledo Trust Co. vs. The Santa Barbara Foundation*. This application is being made to all parties as required by Supreme Court Rule 36.

The Ohio Bankers Association is a statewide trade association representing virtually all of Ohio's commercial banks and their trust departments, which will be adversely impacted by the decision of the Ohio Supreme Court in this case. Thus we can provide the Supreme Court with valuable input from the broader perspective of the industry as a whole. Such information supplementing that of the parties in their respective briefs, may be beneficial to the court in reaching its decision.

In order to properly prepare our filing, we would appreciate your notice of acquiescence or denial as soon as it is convenient.

Sincerely,

/s/Jeffrey D. Quayle

Jeffrey D. Quayle

Executive Director Trust and General Counsel

JDQ:jlk

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January 11, 1988

Ohio Bankers Association
Trust Division
51 North High Street
Columbus, Ohio 43215

Attn: Jeffrey D. Quayle, Esq.

The Toledo Trust Co. v. Santa Barbara Foundation

Gentlemen:

This is in response to your January 8, 1988 letter requesting my consent to your filing a brief amicus curiae in *The Toledo Trust Company v. Santa Barbara Foundation*, No. 87-1132, now pending in the Supreme Court of the United States. As an attorney for The Toledo Trust Company, as Trustee of Trust No. 4118, one of the petitioners in that case, I hereby give such consent.

Very truly yours,

/s/E. Thomas Maguire
E. Thomas Maguire

ETM:lss

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TRUST DIVISION/OHIO BANKERS ASSOCIATION

51 North High Street
Columbus, Ohio 43215
Telephone 614/221-5121

January 8, 1988

Mr. John J. McHugh, III
Watkins, Bates & Handwork
1200 National Bank Building
Toledo, Ohio 43604-1157

Dear Mr. McHugh:

The Ohio Bankers Association Trust Division requests your permission to file an amicus curiae brief in support of the petition for certiorari in the United States Supreme Court, filed by the Toledo Trust Company in the case of *Toledo Trust Co. vs. The Santa Barbara Foundation*. This application is being made to all parties as required by Supreme Court Rule 36.

The Ohio Bankers Association is a statewide trade association representing virtually all of Ohio's commercial banks and their trust departments, which will be adversely impacted by the decision of the Ohio Supreme Court in this case. Thus we can provide the Supreme Court with valuable input from the broader perspective of the industry as a whole. Such information supplementing that of the parties in their respective briefs, may be beneficial to the court in reaching its decision.

In order to properly prepare our filing, we would appreciate your notice of acquiescence or denial as soon as it is convenient.

Sincerely,

/s/Jeffrey D. Quayle

Jeffrey D. Quayle

Executive Director Trust and General Counsel

JDQ:jlk

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January 11, 1988

Jeffrey D. Quayle, Esq.
Executive Director, Trust
and General Counsel
Ohio Bankers Association
51 North High Street
Columbus, Ohio 43215

Dear Mr. Quayle:

This acknowledges receipt on January 11 of your correspondence of January 8 requesting permission to file an *amicus curiae* brief in support of the petition for certiorari filed by The Toledo Trust Company, pursuant to Supreme Court Rule 36.

We understand that the Ohio Bankers Association has expressed, in writing, its objection to the decision by the Ohio Supreme Court in *The Toledo Trust Company v. Santa Barbara Foundation*. We further understand that the Ohio Bankers Association position has been discussed with and communicated to The Toledo Trust Company either directly or through counsel, and believe that its interests are adequately represented by the petition for certiorari. We will be happy to review our assessment, however, if you would provide us generally with information as to how the interests to be asserted by the Ohio Bankers Association are not set forth or represented in the petition for certiorari, and how those interests are relevant to disposition of the case.

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Your prompt response is requested so that we might in turn favor you with reply, permitting you to address the matter to the Court in a timely fashion.

Very truly yours,

/s/John J. McHugh, III
John J. McHugh, III

JJM:rlm

cc: Donald F. Melhorn, Jr., Esq.
Michael S. Messenger, Esq.
William F. Bates, Esq.

CALIFORNIA CIVIL CODE SECTION 1390.2 (Deering)

PROPERTY COVERED BY SPECIAL POWER AS SUBJECT TO CLAIMS OF CREDITORS.

Property covered by a special power of appointment is not subject to the claims of creditors of the donee or of his estate or to the expenses of the administration of his estate.

